No. 83-2145

In the Supreme Court of the United States

OCTOBER TERM, 1984

NAVIOS CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they are entitled to recover in admiralty economic losses sustained without physical damage to their vessels or other property.

1. On January 28, 1980, the S/S Capricorn and the United States Coast Guard buoy tender Blackthorn collided in Tampa Bay. The Blackthorn sank, precluding deep-draft vessels from entering or leaving the port of Tampa until the wreck was removed about 26 days later. Pet. App. A3; *Kingston Shipping Co.* v. *Roberts*, 667 F.2d 34, 35 (11th Cir.), cert. denied, 458 U.S. 1108 (1982). Separate complaints for exoneration or limitation of liability were filed in the United States District Court for the Middle District of Florida by the United States, owner of the Blackthorn, and Kingston Shipping Company and Apex Marine

Corporation, the owner and charterer, respectively, of the Capricorn (Pet. App. A1, A3). Petitioners, who own vessels that were delayed in port until the channel was cleared, filed claims in the two actions for damages resulting from the delay.

The district court ruled in favor of Kingston and Apex Marine on March 16, 1981 (Pet. App. A3-A11), and in favor of the United States on October 13, 1981 (*id.* at A1-A2). The appeals were not consolidated. On February 4, 1982, the court of appeals affirmed in the Kingston and Apex Marine action, relying on *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U.S. 303 (1927), which "made clear that a party may not recover for economic losses not associated with physical damages" (*Kingston Shipping Co.* v. *Roberts,* 667 F.2d at 35). This Court denied certiorari (*sub nom. ABC Containerline, N.V.* v. *Kingston Shipping Co.,* No. 81-2033, 458 U.S. 1108 (1982)).

Recognizing that its decision in *Kingston Shipping Co.* "controls this case," the court of appeals affirmed the order in favor of the United States on November 16, 1983 (Pet. App. A30-A31). The same day, the same panel affirmed an order denying liability for economic losses in another case involving a different accident that had temporarily closed the port of Tampa. *Hercules Carriers, Inc.* v. *Florida,* 720 F.2d 1201 (Pet. App. A12-A29). The court granted rehearing en banc in both cases (*id.* at A32-A34), and the judgments were affirmed by an equally divided en banc court (*id.* at A35-A36). This petition followed.[1]

2. The decision of the court of appeals is consistent with this Court's decision in *Robins Dry Dock & Repair Co.* v. *Flint,* 275 U.S. 303 (1927), and does not conflict with any

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[1]A petition raising the same question presented here is pending in the *Hercules Carriers* case. *Canadian Transport Co.* v. *Hercules Carriers, Inc.,* No. 83-2135 (filed June 28, 1984).

decision of another court of appeals. Just two years ago, petitioners sought review of a decision reaching the same result and arising out of the same facts (*Kingston Shipping Co., supra*). This Court denied their petition for a writ of certiorari then, and they cite no cases decided since that time that are in conflict with the decision below.[2] For these reasons, review by this Court is unwarranted.[3]

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[2]In *Louisiana ex rel. Guste* v. *M/V Testbank*, 728 F.2d 748 (5th Cir. 1984), reh'g granted, No. 82-3059 (May 14, 1984) (en banc) (Pet. App. A41-A52, A53-A54), the panel relied on *Robins* to deny claims for economic loss in the absence of physical damage. The case is scheduled for argument before the en banc court on September 11, 1984.

[3]Indeed, petitioners should be precluded from relitigating the question they present after losing the identical issue on the same facts in the *Kingston Shipping Co.* case. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 329 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971). The "exception to the principles of collateral estoppel for 'unmixed questions of law' arising in 'successive actions involving unrelated subject matter' " should not be applied here because both actions involve the same subject matter. *United States* v. *Stauffer Chemical Co.*, No. 82-1448 (Jan. 10, 1984), slip op. 5 (quoting *Montana* v. *United States*, 440 U.S. 147, 162 (1979)). Because it arises from the same facts, the instant case is not "so unrelated to the prior case that relitigation of the issue is warranted" (*Stauffer Chemical Co.*, slip op. 6). See *Montana* v. *United States*, 440 U.S. at 163 (exception not applicable where present claims are "closely aligned in time and subject matter" to those in the previous case).

While the Court's discussion of the exception in *Stauffer Chemical Co.*, *Montana*, and *United States* v. *Moser*, 266 U.S. 236 (1924), involved mutuality of parties, there is nothing in those cases to indicate that it would be applied differently in cases such as this where, although mutuality is lacking, the claims in both cases arise out of precisely the same allegedly tortious conduct. The Restatement (Second) of Judgments states § 29(7) (1982) that issue preclusion applies with respect to issues of law in the absence of mutuality unless "treating [the issue] as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule." Given the short period of time that has elapsed since petitioners last sought review by this Court, and the absence of any relevant intervening developments in the

In *Robins*, the Court held that the time charterers of a vessel could not recover in contract or in tort for the loss of use of the vessel caused by a dry dock company's negligent damage to its propeller and the ensuing delay until it was repaired. The purely economic loss claimed as a result of the delay was, the Court determined, too remote to permit recovery (275 U.S. at 308-309). The courts of appeals that have considered the question have consistently followed the general rule applied in *Robins* that purely economic losses associated with negligent conduct are not recoverable in the absence of physical harm to the plaintiff's property. See *Akron Corp.* v. *M/T Cantigny*, 706 F.2d 151 (5th Cir. 1983); *Vicksburg Towing Co.* v. *Mississippi Marine Transport Co.*, 609 F.2d 176 (5th Cir. 1980); *Dick Meyers Towing Service, Inc.* v. *United States*, 577 F.2d 1023 (5th Cir. 1978), cert. denied, 440 U.S. 908 (1979); *Kingston Shipping Co.* v. *Roberts, supra*; *Marine Navigation Sulphur Carriers, Inc.* v. *Lone Star Industries, Inc.*, 638 F.2d 700 (4th Cir. 1981).

Petitioners' claim (Pet. 19-23) of a conflict among the circuits is incorrect.[4] In *Kinsman Transit Co.* v. *City of Buffalo*, 388 F.2d 821 (2d Cir. 1968), the court refused to

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law, preclusion is both appropriate and fair. There is simply no reason under these circumstances to allow petitioners — all of whom were parties to the petition in *Kingston Shipping Co.* — a second bite at review by this Court.

[4]Petitioners' argument that a conflict exists with respect to the Seventh and First Circuits requires only brief discussion. In *Chicago & W.I.R.R.* v. *Motorship Buko Maru*, 505 F.2d 579 (7th Cir. 1974), the court affirmed the recovery of certain economic losses without any discussion of the *Robins* issue. The only losses described in detail by the court (505 F.2d at 580) were sustained by the railroads that were parent companies of the corporation that owned the damaged bridge. Petitioners' statement (Pet. 19) that "the railroads did not own the bridge and therefore suffered no physical damage" is thus incorrect. The only First Circuit case cited by petitioner, *New York, N.H. & H.R. Co.* v.

allow recovery of economic losses arising out of the obstruction of a river. Quoting Justice Holmes' statement in *Robins* (275 U.S. at 309) that "[t]he law does not spread its protection so far," the court found that the claims, while foreseeable, were too remote to be proximately caused by the negligence that resulted in the obstruction (388 F.2d at 824-825). While the court of appeals did not rely on *Robins*, it reached the same result as did both courts below here. Indeed, the court of appeals in *Kinsman Transit Co.* described a hypothetical situation similar to the instant case in which it would deny recovery, apparently as a matter of law (388 F.2d at 825 n.8). In *Union Oil Co.* v. *Oppen*, 501 F.2d 558 (9th Cir. 1974), the court recognized the general rule expressed in *Robins*, but declined to extend it to bar the claims of fishermen whose catches were reduced following

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Piscataqua Navigation Co., 108 F. 92 (1901), was decided before *Robins* and can no longer be regarded as good law. The district court decisions on which petitioners rely (Pet. 19-20) are readily distinguishable. *Burgess* v. *M/V Tamano*, 370 F. Supp. 247 (D. Me. 1973), permitted recovery by fishermen and clam-diggers only. Like *Union Oil Co.* v. *Oppen*, 501 F.2d 558 (9th Cir. 1974), discussed in text, it has no application to the facts of the instant case. In *In re Petition of Boat Demand, Inc.*, 174 F. Supp. 668 (D. Mass. 1959), the claimant suffered physical as well as economic damage. *Green Mountain Power Corp.* v. *General Electric Corp.*, 496 F. Supp. 169 (D. Vt. 1980), applied Vermont law.

The argument made by petitioners in *Canadian Transport Co.* v. *Hercules Carriers, Inc.* (83-2135 Pet. 12), that *Robins* was limited to its facts in *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U.S. 394 (1935), is plainly wrong. In that case, the Court allowed recovery for payments made under the doctrine of general average, because cargo on board a vessel "was placed in jeopardy" (*id.* at 404) along with the vessel when it suffered a collision. There is no indication that *Robins* does not bar claims, such as those made here, of indirect economic loss (see 294 U.S. at 404-405). Finally, even accepting the argument made by petitioners in both cases (Pet. 12-16; 83-2135 Pet. 7-9) that *Robins* itself does not necessarily bar claims for economic loss without physical damage, review would still be unwarranted because of the absence of a conflict with any decision of this Court or of the courts of appeals.

an oil spill. The court carefully limited its holding to this special context (501 F.2d at 567-570). Accordingly, the case does not conflict with the decision below. See *Marine Navigation Sulphur Carriers, Inc.*, 638 F.2d at 702.

The decision below is consistent with tort law generally, which precludes recovery for economic losses caused by negligence in the absence of physical damage. See Restatement (Second) of Torts § 766C (1979). This rule is amply justified by difficulties of proof, the variable nature of the losses that would be claimed, and the restrictions that liability of this sort would place on potential defendants' ability to plan and freedom to act (*id.* § 766C comment a). Reliance merely on traditional tort concepts such as foreseeability — concepts that were developed long before the notion that recovery might be available for purely economic losses was ever entertained — would not be adequate to cut off liability at a reasonable point. See generally *Kinsman Transit Co.*, 388 F.2d at 824-825 & n.8. The physical-impact standard provides the only workable bright-line rule, at least in admiralty, where large and potentially unlimited[5] claims of commercial loss[6] would otherwise be raised routinely. In the absence of a conflict among the courts of appeals, there is no reason for the Court to reconsider this

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[5]Petitioners' argument (Pet. 36-37) that limitation of liability pursuant to 46 U.S.C. 183 would be an adequate safeguard against large claims of economic loss lacks substance. Limitation to the value of the vessel is available only in the absence of the owner's "privity or knowledge," a question that turns on the facts of each case. See, *e.g.*, *Coryell* v. *Phipps*, 317 U.S. 406, 411 (1943). That one has sought the protection of the statute thus does not mean that it will be obtained.

[6]Although petitioners now appear to suggest otherwise (Pet. 4-5), the detention damages they seek include claims for "lost charter hires," *i.e.*, lost profits attributable to contracts that they could not perform during the time the channel was blocked. See Appellants' Record Excerpts 111.

rule or its longstanding decision in *Robins*. In any event, because petitioners are estopped from relitigating the issue (see note 3, *supra*), this case would not be an appropriate one in which to grant review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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